

Excerpt from "International Law" by Charles G. Fenwick
2nd Ed.

THE AGENTS OF INTERNATIONAL INTERCOURSE

The law regulating the diplomatic intercourse between nations is one of the oldest parts of the general body of international law. Indeed, in some of its branches it antedates all other parts of that law. The records of ancient China, India, and Egypt show a respect for the person of ambassadors and for the sacred character of their office. The Greeks and Romans, while having no permanent embassies, recognized the right of sovereign states to send ambassadors, received their envoys with great respect, and accorded to the envoys a personal inviolability supported by the strongest sanctions. In Rome the principle of extraterritoriality found definite, . . . recognition.

. with the development of the independent Italian states in the fourteenth century, embassies took on a formal character, particularly in the case of the papal representatives sent out from the Holy See to the various secular courts. By the fifteenth century the permanent interrepresentation of states, in the form of resident embassies, made its appearance; and within two centuries an elaborate code of diplomatic procedure was built up. Questions of precedence and of the personal inviolability of the ambassador occupied the attention of statesmen and writers and were the occasions of numerous disputes between states. Since the adoption in 1818 of a formal classification of diplomatic agents there have been few important changes in the law. . . . In certain respects the significance of the ambassador's functions has increased in consequence of the closer contacts between states of recent years.

The primary agents of international intercourse are the constitutional heads of the separate states. While international law has no jurisdiction over the organization and personnel of a state's government, it recognizes the domestic constitutional law of each state to the extent of accepting as head of the state the person holding that position with apparent legal right. international law recognizes that the policies announced or the measures pursued by the government are in effect the will of the state. In consequence of this representative character of the head of the state, certain formalities and courtesies attend the visit of the monarch or president of one state to the head of another state, and the privileges and immunities regularly extended to ambassadors are extended to them with scrupulous exactness. the head of the state continues to be the personality in whose name ambassadors and ministers are sent from one state and received by another. it is for constitutional law only to determine the organization and functions of his office in respect both to the diplomatic representation of the state in foreign countries and to the supervision of the conduct of the particular persons to whom that task is confided.

... international law deals with the relations between the foreign secretary and the diplomatic representatives of other states. A number of rules, ... have been developed prescribing the procedure by which official communications are exchanged and interviews held between the foreign secretary and the group of residents known collectively as the "diplomatic corps." Moreover, modern international practice makes the secretary of foreign affairs the responsible medium of negotiations with foreign states, so that documents sent out in the name of the state are signed by him and negotiations are conducted in his name. International usage, however, prescribes that, as a general rule, the foreign secretary of one state shall communicate with the foreign secretary of another through the medium of the diplomatic agents resident in the state to which the communication is sent.

(pp 360-361-362)

... The early ambassador of the fifteenth century not only conducted the business of his sovereign but represented his person as well....

At the Congress of Vienna, in 1815, an effort was made "to prevent in the future the inconveniences which have frequently occurred, and which may still occur, from the claims of precedence among the different diplomatic characters" by dividing them into "classes," as follows: (1) ambassadors, legates, or nuncios, who alone were allowed to represent the person of their sovereign; (2) envoys, ministers, or other persons accredited to sovereigns; (3) charges d'affaires, accredited to ministers for foreign affairs. ... It should be observed that ... custom ... decreed that the smaller states shall not appoint representatives of the first class. ...

International law contains no positive rules regarding the personal character or qualifications of the persons appointed by a state as its representatives abroad. ...

(pp 364-365)

Once appointed to his post, international law prescribes that the diplomatic agent shall be armed with certain documents which are the credentials of his office. A "letter of credence," addressed by the head of the state sending the public minister to the head of the foreign state, identifies the minister and designates his rank and the general object of his mission; at the same time, it asks that the minister be received favorably and that full credence be given to what he shall say on the part of his state. ... In addition to the above documents, diplomatic agents also receive from their home governments general or special "instructions" for the conduct of the business intrusted to them; but these are of no concern to international law.

International practice contains a certain number of customary rules regulating the reception of diplomatic agents when they have arrived at the seat of the government to which they are accredited. .

(pp 366-367)

... This reception must be a public one in the case of ambassadors Other rules regulate the notification to be given of the arrival, the privileges and immunities accorded to him before his official reception, and details of ceremonial, these rules have attained a legal status. . . . a breach of them is no more than bad form, unless a deliberate insult should be intended.

The functions or duties performed by diplomatic agents are primarily determined by the municipal law of their home states. . . . A third group of functions brings the minister into direct and official contact with the foreign government. Here international law intervenes to prescribe certain rules of procedure and to impose certain restraints . . in the interest of promoting cooperation and preventing friction between the two countries.

... Diplomatic etiquette likewise forbids public ministers to correspond with the press upon matters which are the subject of official communication, or to publish a note or despatch from their home government before it has been received. . . .

By long custom, antedating perhaps all other rules of international law, the diplomatic agents sent by one state to another have been regarded as possessing a peculiarly sacred character, in consequence of which they have been accorded special privileges and immunities. . . . Grotius wrote in 1625 that there were "two points with regard to ambassadors which are everywhere recognized as prescribed by the law of nations, first that they be admitted, and then that they be not violated." The basis upon which this personal immunity rested was generally found in the principle that the ambassador personified the state or sovereign he represented. From this principle developed not only the custom of according special protection to the person of the ambassador but also a comprehensive exemption from the local jurisdiction. . . . Even the outbreak of war between two countries does not lessen the obligation of the local government in this respect. . . .

In addition to enjoying special protection of their persons, ambassadors are completely immune from the criminal jurisdiction of the state. Under no circumstances may they be prosecuted for offenses against law and order. . . . Should he conspire against the safety of the state, he may temporarily forfeit his personal freedom; but no further punishment, other than expulsion, may be inflicted upon him. The classic cases of conspiracy are those of Count Gyllenberg, the Swedish ambassador in London in 1717, who was arrested for complicity in a plot against George I, and of Prince Cellamare, the Spanish ambassador in Paris, who was arrested in 1718 for conspiring to overthrow the French regent.

(pp 367 - 370 inc)

With the privileges and immunities conferred upon diplomatic officers must be associated those attributed by special treaty agreements to certain public officials engaged in international activities.

The Hague Convention for the Pacific Settlement of International Disputes gave to the members of an arbitration tribunal constituted under its provisions diplomatic privileges and immunities when in the performance of their duties and when outside their own country. Similar immunities are granted by the Covenant to representatives of members of the League of Nations and to officials of the League when engaged in the business of the League, and, by the Statute of the Permanent Court of International Justice, to judges and deputy judges of the court.

The privileges conferred upon ambassadors extend beyond his person to his official residence and to the members of his suite.

The question, to what extent a diplomatic mission possesses a "right of asylum" which may be taken advantage of by fugitives from justice

It is with respect to political refugees . . . that the chief problem has arisen. . . .

. In 1928 a Convention was adopted at Havana by the twenty-one American Republics defining the extent to which asylum might be given. While it was to be denied to persons accused of common crimes and to deserters from the army and navy, it might be granted under certain circumstances, specified in part, to political offenders. . .

(pp 372 - 375 inc)

The privileges and immunities granted are extended in large part to the members of their retinue or suite. Those who are officially connected with the embassy or legation enjoy by old custom the same inviolability and personal exemptions as are enjoyed by the ambassador himself. . .

It is an old rule, deduced from the general principle of the recognized necessity of diplomatic intercourse between states, that public ministers have a "right of innocent passage" through the territory of third states, whether their mission has not yet begun or has officially terminated. . . .

It is in time of war, however, that the question of innocent passage presents special difficulty. . . . The United States . . . points out that it is an inalienable right of sovereign states to exchange ambassadors and that third states, even in time of war, are not justified in denying that right.

. Their personal immunity in such case is clearly established, it is doubtful whether they may claim any other privileges beyond the right to leave the country. . . .

(pp 376 - 378 inc)

The general principle appears to be recognized that a state may for good and sufficient reason demand of a foreign government that it recall an individual minister who has rendered himself persona non grata; but the law is not clear as to what circumstances shall give rise to good and sufficient reason.

参事文書第二七二八—A 號

チャールズ・G・フエンウィツク著「國際法」第二版よりの抜萃

Exh *

國交の行爲者

國家間の外交關係を規定する法律は國際法總體の内でも最も古い部分の一である。それは實際その或る部門に於ては國際法の凡べての他の部分より古いのである。古代支那、印度、エヂプトの記録を見ると大使たる人及びその職務の神聖性が尊重されて居つた事がわかる。ギリシヤ及びローマは自らは恒久的の大使を持つて居なかつたが各主權國が大使を派遣する權利を認めその使節をば非常な尊敬を以て受容し而してそれ等使節に對して人格的不可侵性を附與し最も嚴しい制約を以て之を守らしめた。ローマに於て治外法權の原則は（中略）明確に認められてゐた。第十四紀に於けるイタリーの獨立諸國家の發展に伴ひ大使は公式の性質を帯びるに至つたのである。

Dof Doc 2728—A

ローマ法王國から諸國の宮廷へ派遣された法王代表の場合には特にそうであつた。第十五世紀頃迄には各國家は駐劄大使の形式をとつてそれ等の恒久的代表を相互に派遣する様になつた。そしてそれから二世紀の間に外交手筈の漸進な規則が作り上げられた。大使の順位の問題及びその人

格的不可侵性の問題は政治家及び著述家の注意を集中し幾多の國家間の紛争の原因をなしたのである。一八一八年に外交官の正式の分類が採用されて以來、國際法に於ては重要な變化は殆どなかつた（中略）或る點では大使の職能の意義は・・・近年諸國家間の接觸が緊密を加へた結果益々増大したのである。

國交の主要行爲者は各國家の憲法上の元首である。國際法は一國の政府の組織及び成員に對して何等の管轄權を持たないのであるが國際法は明白な法律上の權利を以て元首たる地位を占める人物をその國家の元首として容認するといふ範圍に於て各國の國內の憲法を認めるのである；；；國際法は政府の發表した政策及び行つた施爲は事實上その國家の意志である。・・・認める。國家の元首が有する此の國家代表の性格の結果として一國の君主又は大統領が他國の元首を訪問する時は一定の形式及び儀禮が守られるのである。そして大使に對して正規に與えられる特權及び免職は細密正確に元首にも與えられるのである。・・・

國家の元首は依然としてその名に於て大使及び公使が一國より派遣され他國に容認される人路たるに類りはない。・・・憲法はたゞ諸外國にその國家の外交代表を派遣すること並にその任務を委託される特定の人々の行動を監督することに關して元首の職務の組織及び機能を決定するに止まる。

・。國際法は外務大臣と他の諸國家の外交代表との間の關係を取扱ふものである。外務大臣と所謂「外交官」と集合的に呼ばれる駐劄外交官のグループとの間に公式通信が交はされ會見が行はれる所の手續を規定する多くの法則が今日迄で發達して來た

且又現代の國際慣習によれば外務大臣が皆外國との交渉にあたる責任者であり従つて國家の名に於て發せられる文書には外務大臣が之に署名しその交渉は外務大臣の名に於て行はれる。しかしながら國際慣習の定める所では一國家の外務大臣が他國家の外務大臣と通信聯絡をなすにあたりはその書信が送達せられる國家に駐劄する外交官を通じて行ふ事が常例となつてゐる (三六〇、三六一、三六二頁)

十五世紀初期の大抵はその本國主權者の事務を執り行ふと同時に主權者その人をも代表するものであつた：

一八一五年のウィーン會議では種々の外交官を左記の階級に區別して頭位の主張から從來層々生じ又今後も生じるかも知れない所の困難な問題を將來に於て防止する爲に努力がはらはれた

一、大使、使節若しくは法王使節—これらのみがその本國の主權者その人を代表する事を認められる

二、特命使節、公使その他外國主權者に對し派遣される者

三代理公使——之は外務大臣に對して派遣される者

——注目すべき事柄は——慣習によつて——「小國家は前記第一種の外代表を任命しない」と定まつてある點である

國際法には外交代表として國家より任命される人の人格並びに資格に關しては何等明確な規定はない（三六四—三六五頁）

國際法の定むる所では一旦その地位に任ぜられれば外交官はその官職に對する信任狀たるべき文書を所持すべき事となつてゐる

一國家の元首が他國家に公人としての公使を派遣するにあつてその相手國元首に宛てられる所謂「信任狀」はその者が公使たる事を證明し又

その階級及びその使命の一般目的をも示すものである。と同時にその公使が派遣先國家に於て好意を以て迎へられ又本國を代表して彼の述べる

事柄に對しては充分な信頼が與えられる事をも要請するものである

上記文書の外に外交官は又その委任された事務遂行のため本國政府より一般的及び特殊の「訓令」を受ける。併しこれは國際法には全然關係ない事柄である

國際慣習上外交官が派遣先政府の所在地に着任する際の接待についても

一定の儀禮的規則がある（三六六、三六七頁）

——このリセプションは大使の場合には公式のものでなければならぬ、——他の規定には到着の通告を爲すべきこと、公式リセプション

以前に大使に與へられる諸々の特權及び免除、儀式の細目等が定められて居り之等規定は既に法律的地位を獲得してゐる。――これら規定の違和は故意の侮蔑が意圖せられておらざる限り單なる非禮に過ぎない

外交官の果す機能即ち任務は主としてその母國の國內法によつて定まつてゐる――第三種の機能に基づき公使は外國政府と直接且つ公式に接觸する。此處に於て國際法は二個國間の協力増進並に摩擦防止の目的の爲その間に入つて手續上の一定の規定を設け一定の制限を加へる

――外交儀式によつても又同じく公人としての公使が公式の通告を必要とする問題に關し新聞社と通信を行ふこと或は本國政府よりの通報又は電報を相手國が受理する以前に發表することを禁じられてゐる……永い間の慣習に基づき恐らく國際法の他の凡ての規定よりも早くから一國が他國に送る外交官は特に神聖なる性格を帶ぶものと看做されて居りこの結果これら外交官には特別の特權及免除が附與されて居る。グロテイウスは一六二五年に「大使に關しては國際法が規定してゐる通り何處でも認められてゐる點が二つある。即ち第一に大使は完全に自由であること、第二に大使は他に優かされざることである」と記し

てゐる。この人格的不可侵性の根柢は大使がその代表する國家又は主權の表徴なりとする原則に在る。

この原則に基き大使の身柄に特別の保護を與へるといふ慣習のみならず駐在國の司法權より全く免除されるといふことも發達して來たのである。二國國間の戰爭勃發に際してもこの點に關する駐在國政府の義務は輕減されない。

大使はその身柄に特別の保護が加へられる外駐在國の司法權に全く拘束される所がない。いかなる事情があつても法律及び秩序違反の虞で起訴されるが如きことはない。一七一一一萬一駐在國の安全を犯すが如き陰謀を企てる場合には一時その身柄の自由を拘束されることもある。追放以外には他の如何なる處置もこれを加へられることがない。歴史的に有名なかかる陰謀事件はジョージ一世に對する反逆共謀の虞で逮捕された一七一七年ロンドン駐在のスエーデン大使ジレンボルク子爵並にフランス摂政顧問の陰謀の虞で一七一八年逮捕されたバリー駐在のスペイン公使セラメヤ公等の事件である。

(三六七頁より三七〇頁)

外交官に付與される特權及び免除に關聯して特別の條約取極めにより國際的活動に關する特定の官吏に與へられる特權及び免除を考へねばなら

め。國際紛争の平和的解決を目的とするヘーグ條約により同規約に基き
 達成せられたる仲裁裁判所の役員に對しその職務遂行時並に自國外に在
 る時の外交上の特權及び免除が付與された。亦これと同様の特權及び
 免除が國際聯盟加盟國の代表並に同聯盟の事務從事中の役員に對しては
 同聯盟規約に依り更に國際正義常設裁判所の裁判官及び裁判官代理に對
 しては同裁判所法に依り夫々付與されてゐる

大使に付與される特權は大使の身柄のみならずその官邸及び隨行員一同
 にまで及んでゐる――

正義よりの逃避者（犯罪人）が利用せぬとも限らぬ「庇護を受ける權利」
 を外交使節がどの程度までこれを有するかといふ問題――

主なる問題が生じたのは政治上の亡命者に關してであつた。――
 一、一、一庇護を與へる程度を決定する協約が一九二八年ハバナに於て二十
 一箇國の米洲共和國により採擇された。この庇護は普通犯罪の被告人及
 び陸海軍逃走兵には與へられぬが政治犯人に對しては一部指定された或
 る事情の下ではこれを付與することが出来よう――

（頁三七二―頁三七五）

付與される特權及び免除は廣くその隨行員一同にまで及んでゐる。大使
 館或は公使館に公式に關係あるものは舊くからの慣習により大使自身の

場合と同様な不可侵性及び身柄の自由を享受する。公人としての公使はその使命が未だ開始されずとも或はまた公式に終了せずとも第三国の領土を通過するに際し「法律に自由なる通行權」を有することは舊くからの規定であつてこれは國家間の外交關係の必要性を認めた一般原則から來てゐる。

然し乍ら法律上自由なる通行といふ問題が特に困難を生ずるのは戰時に際してである。――合衆國は――大使交換は主權國の動かす可からざる權利にして第三國は戰時と雖どもこれが權利を拒否するは不當なりと指摘してゐる

かかる場合の彼等の身柄の自由性は明かに確立されてゐるが彼等が國外立退きの權利以外に他の權利を主張し得るか否かは疑問である。

頁三七六―三七八頁

如何なる國も外國政府に對し好ましからぬ人物となつた私人としての公使についてはその召喚を要求し得る正當にして充分な理由を有するといふ一般原則は認められてゐる筈である。但し如何なる事情が正當にして充分なる理由を生ぜしむるかこの點に關してはこの法律は明かではない

Excerpt from "Cases on International Law" by Fenwick

AGENTS OF INTERNATIONAL INTERCOURSE

Character of Diplomatic Agents.

The law regulating the character of diplomatic agents is one of the oldest branches of international law, with precedents reaching back into ancient Greece and Rome. Elaborate rules have developed regulating the extent to which states have a "right of representation," the classification of diplomatic agents, the formalities attending the appointment of particular agents, the credentials of their office and their reception by the foreign state.*****

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Privileges and Immunities of Diplomatic Agents.

The privileges and immunities of diplomatic agents are so well established that few questions arise in connection with the head of the diplomatic mission or his immediate subordinates. The old fiction of the extraterritoriality of the embassy has given way to the more practical principle of recognizing certain definite exemptions belonging to the diplomatic agent, based upon the necessity of securing to him the fullest possible freedom in the discharge of his official duties.*****

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辭典 第二七二八號-B

フエンウイク著「國際法に基く問題」よりの抜萃

國交の代表者

外交官の資格

外交官の資格を規定する法律は國際法の最も古い部門の一に屬し、その先例は古代ギリシヤ及ローマに溯る。國家が有する所謂「代表權」の範圍、外交官の分類、各代表者の任命に伴ふ手續その自職の信任狀、及び外國による信任狀の受理、等を規定する細則が相違して來た。

(第五九七頁)

外交官の特権及び免除

外交官の特権及び免除の設定は充分に出来てゐるから外交官の長又はその直下の部下に關し、問題が起ることは稀である。昔作られた大使館の治外法權に代つて、外交官に關する、ある一定の免除を認める一層實際的な原則が生れて來たが、これは外交官がその職務を遂行するに際し出來る丈の自由を確保する必要に基いたものである。

(第六〇五頁)